(30)

No. [redacted] 1261

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

WARD HOLT, *Petitioner*,

v.

TEXAS-NEW MEXICO PIPE LINE COMPANY, *Respondent*

RESPONDENT'S OPPOSING BRIEF TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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I.

Statement

On September 22, 1941, Petitioner, Ward Holt, while working for his employer, T. E. KING CONSTRUCTION COMPANY, was injured from an explosion of dynamite. The Construction Company carried Workmen's Compensation Insurance protecting its employees, including petitioner, and petitioner collected $3,000.00 from this insurance carrier by virtue of his injury (R. p. 141), which under the Texas Compensation Act is his exclusive remedy against his master, then filed this suit against respondent to recover damages arising out of the same injury (R. p. 2), on the theory that laying a pipe line across a West Texas pasture is ultra dangerous work, despite the use of skill, and that the contractee of such work is liable for injuries of the employees of the

independent contractor, although they arose from negligence of such independent contractor and not from the performance of the work.

The facts in this case as stated in the Circuit Court's opinion (145 Fed. (2d) 862), are hereby adopted by respondent, but for the sake of brevity will not be repeated.

II.

Reply to Petitioner's Objections to the Facts Stated in the Circuit Court's Opinion

To the Circuit Court's statement of the facts, petitioner makes only two objections. We state and discuss them in their order:

Petitioner asserts that the Circuit Court erred in holding:

> "Tony Hudler, a welding inspector employed by the Company to see that the work met with the specifications of the contract, came up to the group and told the straw boss that there were some humps or irregularities in the rock section of the ditch that would have to be dug out" (Petition, p. 5).

The statement of the Circuit Court of Appeals is substantially petitioner's own testimony. He testified that Tony Hudler was respondent's inspector (R. pp. 21, 22, 32) and that John Rush was straw boss for the independent contractor, King Construction Company (R. p. 32); and:

> "A. Well, these bumps, we were sent back by John Rush, carried us back. Tony Hudler told John Rush to go back. John Rush was straw boss, worked just like we did for King Construction Company. Tony Hudler told him to take some men and dig them bumps out of the ditch. So we was put on the truck.

John Rush picked out four of us, and the truck carried us back to these bumps about two miles back down the ditch, and told us to dig them bumps out from there on John Rush dug just like we did, he worked just like we did, he was helping us dig out the bumps" (R. p. 22).

A. Well, Mr. Rush and Mr. King was the only ones that ever gave me orders what to do" (R. p. 32).

That Rush took the men back, Hudler did not go with them (R. p. 33).

The court's statement is also supported, not contradicted, by the testimony of petitioner's witness Perkins (p. 43). The testimony of Perkins referred to by petitioner to the effect that Hudler sent the men back, was stricken and properly ignored by the court (R. p. 41), and Perkins' testimony left in the record on this point was:

"Q. What Mr. Hudler said was there were some high places back in the rocks that would have to be dug out, isn't that correct?
A. He said the high places would have to be dug out.
Q. He told that to Mr. Rush, your foreman, didn't he?
A. Well, yes, he told Rush to take some men and go back.
Q. He didn't tell Rush what men to take, did he?
A. Well, I couldn't say about that. He just came on and got us to go back.
Q. Rush came along and got you?
A. Rush did, and called us and took us back there" (R. p. 43).

Hudler was a welder inspector for respondent and his duties were to see that the welding job was performed by the contractor, King Construction Company, in accordance with the contract (R. pp. 122-124, R. pp. 111-112, R. pp. 127-128).

2. Petitioner's second objection to the fact findings stated in the opinion of the Court of ~~Civil~~ Circuit Appeals is that the Court ~~of Civil Appeals~~ erred in holding that: "The existence of the danger was unknown to the company"—meaning respondent (Petition, p. 5).

Following that objection, there appears in the petition statement from the record concerning Koepps and Enlow, who were also inspectors for respondent on the pipe line construction job being performed by King Construction Company, the independent contractor, but this statement does not by the farthest stretch of the imagination show any knowledge on the part of these inspectors as to the presence of unexploded dynamite where petitioner and his fellow employees were digging.

Tony Hudler was the only inspector for respondent whom petitioner even attempted to charge with knowledge of the presence of the unexploded dynamite (R. pp. 2-9), and throughout the trial of this case petitioner sought to impute this knowledge to Hudler, only because of the presence of the bumps in the ditch (R. p. 4, p. 68, p. 91, p. 106, p. 124, p. 137). Hudler testified positively: "I never had any idea there was dynamite there" (R. p. 138). The record shows without controversy that Hudler was a welder and had no duties with respect to the dynamiting, and was in fact inexperienced in the use of dynamite, and that a bump in a ditch to Hudler just meant a high spot in the ditch that would have to be removed before the pipe line could be lowered (R. p. 131):

"Q. Did it make any difference to you how the contractor cut down the bumps or leveled up the ditch?
A. That wasn't nothing to us. It was up to the contractor to give us a finished ditch.
Q. I will ask you whether it is anything unusual to have these bumps in the ditch that have to be

cleaned out before the pipe can be lowered?

A. I have never been on one where there wasn't they would have to keep a few men to level it down, the high spots, to set the pipe * * *

Q. If you had seen a bump out there in that ditch, whether or not there had been any dynamiting along anywhere, would you have thought there was a piece of unexploded dynamite in that bump?

A. No, it would not indicate that to me. It would just be a high spot as far as that is concerned; if it wasn't the right depth it would have been my duty to have asked them to get the thing to the right depth" (R. p. 132).

The record further shows that the bumps in the ditch did not indicate the presence of unexploded dynamite to petitioner (R. p. 34), nor to his fellow employees (R. p. 115). Perkins, petitioner's witness and fellow employee, also testified:

"Q. When did you first start digging bumps out of the ditch?

A. Well, just started whenever that had to be done. I don't know just when. There would be places, you know, that this rock would have to be dug up in order to lower your pipe line. I told you yesterday whenever that had to be done there was some sent back to do it" (R. p. 114).

So the record shows and common knowledge confirms that bumps in a ditch in pipeline construction were not unusual, but always encountered and had to be dug out before the ditch was ready for the pipe, and there is no evidence in the Record, and petitioner cites none, charging respondent with notice of this unexploded dynamite where petitioner and his fellow employees were working. In fact,

the testimony of Hudler that he did not know of the presence of the dynamite is uncontradicted.

Petitioner cites the case of APEX CONSTRUCTION COMPANY V. FARROW, 71 S.W. (2d), p. 325, but the first lines in that case:

> "Appellants did not produce either of the employees charged with the custody or possession and use of the dynamite caps"

in itself distinguishes it from this. Respondent had no employee charged with the custody or possession and use of the dynamite caps. The entire pipeline construction, including the dynamiting, was performed by King Construction Company, and not by respondent, and there is not one word to the contrary in the Record.

Consider: If the bumps charged Hudler with notice of unexploded dynamite, then the bumps charged petitioner with the same notice. Wherefore, petitioner cannot recover (RESTATEMENT OF THE LAW OF TORTS, Section 523).

Hudler owed no duty to petitioner to look for dynamite, and in the absence of such duty he could not be charged with constructive knowledge.

Humble Oil & Refining Co. v. Bell, 180 S.W. (2d) 970 (Tex. Civ. App.—affirmed by Texas Sup. Ct. on another ground, 181 S.W. (2d) 569);
Proctor v. San Antonio Street Ry. Co., 62 S.W. 939 (Tex. Civ. App.—writ denied);
Southern Oil Company v. Church, 74 S.W. 797, 75 S.W. 817 (Tex. Civ. App.—writ denied);
Hailey v. M. K. & T. Ry. Co., 70 S.W. (2d) 249 (Tex. Civ. App.—writ denied).

The duty here of protecting petitioner from the danger of the unexploded dynamite was cast in law upon petitioner's

master, King Construction Company under the master-servant relationship, and not upon respondent; and in this connection the master-servant authorities cited by petitioner (PETERS v. GEORGE, 154 Fed. 634; BOAL v. ELECTRIC STORAGE BATTERY CO., 98 Fed. (2d) 815; MATY v. GRASSELLI CHEMICAL CO., 98 Fed. (2d) 877, and AMERICAN JURISPRUDENCE, Vol. 35, Section 129) are not in point, because obviously they refer to a different relationship and different duties than those here involved. King Construction Company, the independent contractor, and his employees were under the contract and in fact in possession and control of the premises and used its own means and methods in constructing the pipeline, being responsible to respondent for only the final result.

R. E. COX CO. v. KELLOGG, 145 S.W. (2d) 675, cited by petitioner, is not in point because of the difference in the legal duties owed by the storekeeper in that case and respondent in this case. Here the independent contractor was under the contract and in fact placed in possession and control of the right of way, and was itself charged with the duty to keep it safe for those whom it impliedly invited or permitted to enter thereon. Moreover, the accident in this case arose from the positive acts of negligence of the independent contractor during the course of the performance of the contract, purely collateral to the contract, and not from any defect or danger on the premises of which respondent had possession or control or with respect to which respondent owed any duty to the independent contractor or its servants. See Annotation 44, A. L. R., p. 950.

The record shows that it was the duty of Jett and the dynamite crew working for the independent contractor, and their duty alone, to remove any unexploded dynamite, and that they were the only persons who could have learned

of the presence of the unexploded charges, because they had set out the shots and knew their location.

Petitioner's witness Reagan testified:

"Q. Mr. Reagan, as you have testified here if a stick of dynamite did not go off, whether or not there would be any mound there that you could tell anything about would depend somewhat on how close together the shots were put, isn't that true?

A. That is what I am saying, but the man who spaces the holes, he knows just about where his holes should be, and he steps them off, you know, one, two, three steps, and he, after the charges have exploded he looks over his terrain, the man that is in charge, he will be the one to see what damage—or in other words what good his shooting has done.

Q. The man in charge of the dynamiting, isn't it a fact the man in charge of the dynamiting after the dynamiting is done he look(s) where it has been done, isn't that right?

A. Yes, sir.

Q. That is his job?

A. Then move the loose—

Q. Then if there is a charge that has not gone off it is the job of the man that has set out the dynamite to do something about it, isn't that right?

A. Yes, sir" (R. pp. 92-93).

Petitioner's witness Holcomb testified:

"Q. Now, if you set off dynamite with individual fuses isn't it customary for the man who sets off the dynamite to count the explosions as they go off, in order to see whether every charge he put out has been exploded?

A. Yes, sir, it is customary.

Q. That is his job, that is his duty, isn't it?

A. Yes, sir.

Q. In those dynamiting operations isn't it a fact that the man that sets off the dynamite usually sees that the charges are exploded or he removes them?
A. Yes, sir.
Q. The man that sets out a charge of dynamite, he is the only one that knows how many charges there are and where they have been set out, is that right?
Q. That is correct, isn't it?
A. Yes, sir.
Q. Of course, if a man can count correctly and listen correctly he can tell from the sound whether all the charges he has set out have been exploded, can't he, by individual fuses?
A. Yes, sir, he could if he could count correctly and listen correctly.
Q. Now, when a man that has set out the dynamite looks over the place where it has been set out, after the explosion, if he sees a place there where he sets a charge and it has not been exploded then he knows there is still an unexploded charge there, doesn't he?
A. Yes, sir, he should" (R. pp. 82-83).

So here Hudler had the right to assume, and did assume (R. p. 139), that the independent contractor's dynamite crew had performed their duties properly, and Hudler was not required to anticipate the negligence of Jett and his crew in leaving dynamite in the ditch. To impute this knowledge to Hudler would impose on him the burden of anticipating Jett's negligence. This is not the law in Texas.

Railway v. Shetter, 59 S.W. 533 (Tex. Sup. Ct.);
Railway v. Napier, 143 S.W. (2d) 754 (Tex. Sup. Ct.).

We respectfully submit that the Circuit Court properly held:

"The existence of the danger was unknown to the company, and such knowledge could not be imputed to it; nor was the danger of the injury reasonably foreseeable."

III.

Answer to Jett's Purported Affidavit
(Petition, pp. 11-14.)

(1) Respondent objects to the ex parte affidavit of James E. Jett, p. 11 of the Petition, and moves to strike it from said Petition because same is no part of the Record. This ex parte affidavit is not a part of the Record, and as this Honorable Court has held many times, new evidence not before the trial court cannot be received by the Supreme Court, but the Court is required to pass on the Record as certified by the Circuit Court.

Russell v. Southard, 53 U.S. 139, 12 How. 139, 13 L. Ed. 937;
Roener v. Simon, 91 U.S. 149, 23 L. Ed. 267;
Schley v. Pullmans Palace Car Co., 120 U.S. 575, 30 L. Ed. 789;
Bechtel v. U. S., 101 U.S. 597, 25 L. Ed. 1019;
Hecht v. Boughton, 105 U.S. 235, 26 L. Ed. 1018;
Thornton v. Carson, 11 U.S. 596, 3 L. Ed. 451;
McClellans v. Garland, 54 L. Ed. 762.

Appellate Courts must confine their consideration to the record, or exercise original and plenary jurisdiction to try the new issues raised, or deny to the litigants due process of law. This Honorable Court has never assumed original jurisdiction of ordinary lawsuits between citizens such as this, and certainly will not act upon an ex parte affidavit, which on its face shows the affiant most vulnerable to cross-examination, without according to respondent the right of cross-examination of the affiant, and the further right of impeaching or contradicting him. To do so would be to deprive respondent of its constitutional right of trial by jury and of due process of law.

(2) The record in this case would not entitle petitioner to a new trial upon the ground of the allegedly newly discovered evidence of Jett set up in the ex parte affidavit, even if it had been filed seasonably in the trial court, for no justification is shown for petitioner's failure to produce the witness in court for examination and cross-examination. The vague insinuations and palpable conclusion in the ex parte affidavit in themselves demonstrate their vulnerability to cross-examination.

(3) This ex parte affidavit does not show that Hudler knew there was unexploded dynamite at the time and place Rush, the independent contractor's straw boss, took the men, including petitioner, to dig out the bumps. That high place in the ditch was some two miles from where the men started, and the most that can be said for the affidavit is that it contains a conclusion, a surmise without factual support that Koepp and Hudler must have known that the dynamite crew had at times relighted unexploded dynamite, as it was their duty to do.

Hudler, however, owed no duty to Petitioner to search for unexploded dynamite or to warn the independent contractor or its servants of dangers arising during the course of the work, especially when such dangers arose from negligence of such servants. Apparently Petitioner knew more about the situation than Hudler.

Hudler had the legal right to rely upon Jett and his crew performing their duties with ordinary care in either relighting unexploded dynamite or advising their fellow employees, including Petitioner, of its presence, and was under no duty to anticipate negligence or danger arising therefrom.

IV.

Answer to Petitioner's Contention That Holt Telling Rush, the Straw Boss, to Take Some Men Back and Dig Out the Bumps Was a Negligent Order

(Pet. p. 16, Brief p. 19.)

1. As shown from quotations from the Record, post, page 2, et seq., Hudler's statement to Rush, the straw boss of the independent contractor, was nothing more than an expression in layman's language of the employer's idea that the result contracted for had not been completed according to the specifications in the contract, and was but the exercise of the respondent's contractual right to exact performance in accordance with specifications. LONE STAR GAS CO. v. KELLY (Tex. Com. App.), 46 S.W. (2d), p. 657, Par. 4. The ditch had to be to a uniform level depth before the pipe could be laid (R. p. 130), and as Hudler stated, it made no difference to him how the contractor cut down the bumps or leveled up the ditch—"it was up to the contractor to give us a finished ditch" (R. p. 132).

2. After all, the sole proximate cause of Petitioner's injury was the negligence of Jett and the independent contractor's dynamite crew, wholly collateral to the result for which the Petitioner contracted.

3. The only legal relationship between Holt and respondent or Hudler which could confer legal right upon Hudler to give Holt any order, is the relationship of Master and Servant, which did not exist, but which if existing would bar Holt's right to recover in tort, for the Workmen's Compensation Act of Texas affords Holt his exclusive remedy against his Master, and he has successfully exercised that remedy.

V.

Answer to Petitioner's Contention That Respondent Owed Petitioner the Duty to Furnish a Safe Place to Work

1. As held by the Circuit Court, this principle has no application to the situation here presented. The premises were free of danger at the time the independent contractor took possession, and the premises were rendered unsafe solely by the failure of the independent contractor or his employees to remove the unexploded dynamite.

2. MONTGOMERY v. HOUSTON TEXTILE MILLS, 45 S.W. (2d) 140 (Tex. Com. App.), and similar cases relied on by petitioner are distinguishable, in that there defendant was held liable not for a condition brought about by the independent contractor, but for a condition caused by defendant's own employees, and this distinction between our case and MONTGOMERY v. HOUSTON TEXTILE MILLS is so well expressed in HAILEY v. M. K. & T. RY. CO., 70 S.W. (2d) 249 (Tex. Civ. App., writ denied) that we cannot improve on the language there, and that case is a complete answer to petitioner's contention. It is stated in the headnote:

> "Where employee of independent contractor constructing railroad underpass was injured by cave-in, railroad held not negligent in failing to furnish such workman safe place to work, in failing to warn him of cave-in, or in failing to inspect premises, or to brace walls."

Also on this point please see:

Humble Oil & Refining Co. v. Bell, 180 S.W. (2d) 970;
Proctor v. San Antonio Street Ry. Co., 62 S.W. 939 (writ denied);

Southern Oil Company v. Church, 74 S.W. 797, 75 S.W. 817 (writ denied);
Anno. 44 A.L.R. p. 950; p. 1004.

3. In DAYTON v. FREE (Utah Sup.), 148 Pac. 408, plaintiff was injured by an unexploded charge of dynamite left in the mine by a previous shift. There the Supreme Court of Utah held that the employer defendant did not owe any duty to plaintiff, employee of independent contractor, to warn him of the unexploded dynamite, or to guard him against dangers created by the negligence of the independent contractor and his employees.

VI.

The Judgment of the Trial Court and the Circuit Court Are Correct, the Three Controlling Reasons Following

1. The contract between Respondent and King Construction Company did not call for work intrinsically dangerous, in that the contract could be performed with safety by the exercise of ordinary care on the part of the independent contractor and his employees.

In CAMERON MILL & ELEVATOR COMPANY v. ANDERSON (Tex. Sup.), 81 S.W. page 282, the Supreme Court of Texas laid down the rule on this question, since followed by our Texas Courts, in this language:

> "As we understand, the general rule is that one who is having a piece of work done by an independent contractor is not liable for the negligence of the latter, but to this rule there is a well-marked exception. So far as we have seen, the limitation of the rule has been by no one better expressed than by Judge Dillon. He says:

> 'The general rule is stated in the preceding section, but it is important to bear in mind that it does not apply where the contract *directly* requires the performance of a work intrinsically dangerous HOWEVER SKILLFULLY PERFORMED. In such a case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract.' " (Emphasis ours.)

In other words, the defendant is not ordinarily liable for negligence of an independent contractor or his employees, the exception being where the contract *directly* requires performance of work intrinsically dangerous, "HOWEVER SKILLFULLY PERFORMED." And here petitioner's own theory of the case negatives the applicability of this exception, because petitioner contends that the dynamiting could be carried on safely by the exercise of ordinary care on the part of the independent contractor and his employees. (R. p. 2-9.)

The contract here involved did not expressly require the use of dynamite, in that the contractor was free to use his own means and methods in digging the ditch, and respondent was interested only in the final result; but if it be considered that the contract contemplated the use of dynamite by the contractor, nevertheless this did not make performance of the contract intrinsically dangerous.

It is true that some cases have held that contracts requiring blasting are inherently dangerous, but an examination of these cases shows that they come within the rule of CAMERON MILL & ELEVATOR COMPANY v. ANDERSON, in that the contract directly required the performance of a work intrinsically dangerous, however skillfully performed, such as blasting in an inhabited region, or public highway, where damage to third parties or property could be anticipated from the shock or falling stones (CISCO & N. E. RY. CO. v. PIPELINE COMPANY, 240 S.W. 990 (cited by petitioner).

The rule applicable to this case is well stated in 19 TEXAS JURISPRUDENCE, Section 11, page 467:

> "As to explosions set off by an independent contractor, it has been said that ordinary blasting operations in themselves are not considered so intrinsically dangerous as to render the employer liable for the contractor's negligent acts; that is, the employer is not liable by reason of the act of employing a contractor to do the work; there is not imposed upon him the absolute duty to take special precautions to avoid injuries from the contractor's operations. However, the rule absolving the employer from liability for injury resulting from the blasting operations does not obtain where the work is intrinsically and inherently dangerous *even though skillfully performed*, the case being brought within the exception to the general rule exempting a principal from liability for the consequences of the work done by an independent contractor. In such case both the employer and the independent contractor are liable to one whose property has been injured whether the contractor's act was done negligently or otherwise." (Italics ours.)

Again in KENDALL v. JOHNSON (Wash. Sup.), 99 Pac. 310:

> "The work of blasting may or may not fall within the exceptions to the general rule, according to the particular circumstances of the individual case; but under the facts here presented, where the parties were employed to construct a railroad grade in the Cascade Mountains, far removed from any human habitation, we think the general rule of nonliability applies."

Again, in 14 RULING CASE LAW, Section 31, page 99:

> "The mere fact that work which is the subject of a contract requires blasting will not, ipso facto, render the employer liable upon the theory that the work con-

tracted for is a nuisance or is intrinsically dangerous. * * * BLASTING IN THE CONSTRUCTION OF A WAGON ROAD THROUGH AN UNINHABITED AND CONSTANTLY UNTRAVELED AND WILD MOUNTAIN REGION IS NOT NECESSARILY A DANGEROUS WORK OR A NUISANCE." (Emphasis ours.)

Please recall that the pipeline here was being constructed through "barren lands."

The exact point has heretofore been decided in Texas in a case, just as ours, involving pipeline construction, namely, LONE STAR GAS COMPANY v. KELLY, 46 S.W. (2d) 656 (Tex. Com. App.). There, as here, the defense was that the pipeline was being laid by independent contractor. There, as here, plaintiff's counsel contended that the work involved was intrinsically dangerous. There the Court held:

"Counsel for Kelly contend that the undertaking here involved was so intrinsically dangerous within itself that the Lone Star Gas Company could not legally delegate to another the right to perform it, and thereby relieve itself from liability. We see nothing so intrinsically dangerous in this work as would render it unlawful for the gas company to contract for it to be done by an independent contractor."

In DIBERT v. GIEBISCH, 144 Pac. 1184, the Court stated:

"These two exceptions to the rule adverted to are not thought to be involved herein, since it is believed that the work of blasting stumps is not essentially dangerous *when proper care is exercised*. Nor does such work in a sparsely settled community necessarily create a nuisance, but it may be, and often is, dangerous by reason of the negligent use of the high explosives employed to clear land." (Italics ours.)

In JOSEPH R. FORD v. MARYLAND, 219 Fed. 827, the Court held that work in loading a steamship with dynamite was not inherently dangerous, within the meaning of the rule rendering the employer liable for injuries to third parties; quoting from that opinion:

> "It was not disputed that dynamite may be loaded with perfect safety if adequate care be taken against concussion and heat. There was no danger of either except from the details of the work, and therefore the independent contractor alone was liable."

In DAYTON v. FREE (Utah Sup.), 148 Pac. 408, plaintiff was drilling holes for blasting and struck an unexploded charge of dynamite, and there the Court held the work was not intrinsically dangerous, stating:

> "Here the stipulated work itself, constructing and developing the tunnel, did not involve injurious or mischievous consequences to others. And the injury to plaintiff was not caused from the act of performance, but from the manner of performance over which, as has been seen, the company neither reserved nor exercised direction, control, or supervision. We think, therefore, that the case comes within the general rule that when a person employs a contractor to do work lawful in itself and involving no injurious consequences to others, and damage arises to another through the negligence of the contractor or his servants, the contractor, and not the employer, is liable. We think the ruling right."

WHITE v. MCGEE (Okla. Sup.), 11 Pac. (2d) 924, is closely in point. There plaintiff alleged that decedent was in the employ of defendants and defendants ordered decedent to do blasting and shooting of dynamite in laying a pipeline; that decedent was inexperienced in the use of dynamite, and while so employed explosion occurred, resulting in his death.

Defendants' Marland Companies defended on the grounds that McGee was independent contractor laying the pipeline. There the Supreme Court of Oklahoma stated:

> "An examination of the evidence shows that the defendant Reece E. McGee was an independent contractor laying the pipe in question for the Marland Companies; that he hired the men, including the decedent, and discharged them; that the manner and method of doing the work was left entirely to him; that the Marland Companies paid him for the work on the basis of 22-½ cents per lineal foot; that the Marland Companies had a representative on the job to see that the ditch was dug to a certain depth according to the specifications; that said companies had no supervisory control over the employees, machinery, or tools with which the work was performed; that the defendant McGee exercised his own judgment with reference to the method and manner of doing the work; that the Marland Companies were only interested in seeing that the result of the work was in accordance with their plans and specifications. A review of this record removed any question of doubt as to the correctness of the sustaining of the demurrers to the evidence interposed by the Marland Companies" (p. 926).

SEISMIC EXPLORATIONS v. DOBRAY, 169 S.W. (2d) 739, cited by petitioner, does not hold differently from the Circuit Court, but for a different reason (size of the dynamite) holds dynamiting there was not inherently dangerous, and reaffirms 19 TEX. JUR., page 467, cited here and by the Circuit Court.

LOYD v. HERRINGTON, 178 S.W. (2d) 700 (Tex. Civ. App.), cited by petitioner, was reversed by the Texas Supreme Court in an opinion reported in 182 S.W. (2d) 1003, and we do not construe the opinion of the Supreme Court in that case to hold that all dynamiting is inherently danger-

ous; in fact, there was no reason for the Court there to pass on that point, because it disposes of the case on the well settled principle of law quoted by the Circuit Court in our case (R. p. 168): "No recovery may be allowed from an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employees."

We submit that the Circuit Court correctly held that the work here was not intrinsically dangerous, if skillfully performed.

2. Whether or not the contract called for inherently dangerous work, respondent is not liable, because petitioner's injury did not result directly from the performance of the contract, but resulted solely from collateral negligence of the independent contractor or his employees.

LOYD v. HERRINGTON (Texas Sup.), 182 S.W. 1003, cited and quoted by the Circuit Court (R. 168), is direct authority for the proposition above stated, and we respectfully refer this Honorable Court to the opinion of the Texas Supreme Court in that case.

The law does not impose liability on the employer of independent contractor for every accident arising out of the performance of inherently dangerous work by the independent contractor. This is correctly held by the Texas Supreme Court in LOYD v. HERRINGTON, and in many other cases.

In CAMERON MILL & ELEVATOR CO. v. ANDERSON (Tex. Ct. Civ. App.), 78 S.W. 8, affirmed (Tex. Sup.), 81 S.W. 282, the Court of Civil Appeals quotes LORD COCKBURN as saying:

> "The danger arose directly from the work which they required to be done, and not from the negligent manner of its performance" (78 S.W. p. 9).

That is the point upon which the Court based the exception to the general rule of nonliability of an employer for negligence of an independent contractor.

In ROBBINS v. CHICAGO, 4 Wall. 657, 18 L. Ed. 432, this Honorable Court tersely announced the rule of exemption and its exception in the following language:

> "Where the obstruction or defect caused or created in the street is *purely collateral* to the work contracted to be done, *and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable;* but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." (Italics ours.)

The same distinction is pointed out in MISSOURI VALLEY BRIDGE & IRON CO. v. BALLARD, 116 S.W. 93 (Tex. Civ. App.); and in SMITH v. HUMPHREYVILLE, 104 S.W. 495 (Tex. Civ. App., writ denied); and in EVANS v. BRYANT, 29 S.W. 484 (Tex. Civ. App., writ denied).

The Missouri case of SALMON v. KANSAS CITY, 145 S.W. 16, cites with approval the Texas case of MISSOURI VALLEY IRON & BRIDGE COMPANY v. BALLARD, and holds:

> " * * * The drilling of a hole for a charge of dynamite is certainly not an inherently dangerous task. The negligence of the foreman, which it is charged was the immediate cause of the injury, was not the natural and obvious result of blasting; * * * The plaintiff was not injured in the proper execution of the work, but solely

> by reason of the negligent manner in which it was performed, i.e., the negligent failure to detect the unexploded charge * * * " (p. 23).

These cases distinguish between consequences flowing directly and necessarily from the performance of the contract and consequences resulting from the negligent manner in which the contract was performed by the independent contractor or his employees, and under this settled Texas law respondent is not liable.

3. The rule permitting third parties to recover against the contractee for consequences directly resulting from the performance of contract calling for inherently dangerous work does not enure to the benefit of the employee of the independent contractor: Hence, petitioner cannot recover in any event.

The proposition above stated is well expressed in 14 R. C. L., page 95, as follows:

> "The rule imposing liability on the employer is for the protection of third persons, not for the protection of the contractor's servants, and the latter cannot hold the employer responsible for the contractor's negligence in blasting in a municipal street solely upon the theory that the work was a nuisance or was intrinsically dangerous."

We deduce the same rule from the Texas decisions following:

> Simonton v. Perry (Tex. Ct. Civ. App.), 62 S.W. 1909, writ refused;
> Humble Oil & Refg. Co. v. Bell (Tex. Civ. App.), 180 S.W. (2d) 970, affd. by Tex. Sup. Ct. on other grounds, 181 S.W. (2d) 569.

In CUNNINGHAM v. RAILWAY COMPANY, 51 Tex. 503, the Texas Supreme Court held that the employer or contractee was not liable for the acts of the independent contractor, on the ground that liability should be commensurate to the extent only of right to control.

Under the contract in this case, as well as a matter of law, respondent had no control over the independent contractor or his employees in the manner, means and methods of doing the work, and the independent contractor was responsible to respondent only for the finished product.

We respectfully submit that the Circuit Court properly decided this case in conformity with Texas law, and that petition for writ of certiorari should be denied, and respondent so prays.

Respectfully submitted,

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